15 November 2018

Global Tax Alert

German Federal Parliament adopts *Annual Tax Act 2018*

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Executive summary

On 8 November 2018, the German Federal Parliament (Bundestag) passed the *Annual Tax Act 2018* under the name *Tax Act for the Prevention of VAT Revenue Losses from Trading with Goods over the Internet and Amendment of Further Tax Provisions* (*Gesetz zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften* hereinafter the Act). The initial draft of the Act was published on 25 June 2018.[1] An amended version of the initial draft was published on 1 August 2018.[2] The German Federal Council (Bundesrat) is expected to approve the Act on 23 November 2018.

This Alert summarizes the key changes of the Act.

Detailed discussion

Taxation of capital gains realized by nonresident taxpayers upon the disposition of shares in "land rich" corporations

In accordance with the first amendment of the draft of the law, the Act stipulates that capital gains taxation on the disposition of shares in any resident or nonresident German land rich company should only occur if the taxpayer owned at least 1% at any point in time during the five years prior to the disposition, i.e., no capital gains taxation should occur, where the taxpayer did not own at least 1% at any point in time during the five years prior to the disposition.

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The credit for any foreign income taxes paid on such capital gains, up to the amount of German tax payable on the same capital gain, is still included.

Amendment of the change in ownership limitation rules

Generally, German loss attributes (loss carryforwards, current losses and interest carryforwards) are forfeited upon a harmful ownership change, i.e., partial forfeiture for ownership changes of more than 25% and full forfeiture for ownership changes of more than 50%, both within five years.

According to the Act, former Sec. 8c (1) S. 1 *Corporate Income Tax Act* (CITA) (partial forfeiture for ownership changes of more than 25% up to 50%) shall no longer be applicable and has been removed retroactively for transfers after 31 December 2007. Whereas the previous drafts of the law restricted this change for transfers which occurred prior to 31 December 2015, the Act no longer includes this limitation. If endorsed by the German Federal Council accordingly, German change in ownership limitation rules are not applicable for a change in ownership of 50% or less but only for a change in ownership of more than 50% for any transfers after 31 December 2007.

Sec. 34 (6) CITA, which was introduced with the first amendment of the draft and reinstates the "restructuring exception" provision (Sec. 8c (1a) CITA), remained part of the Act.

According to the "restructuring exception," loss attributes of a company are not forfeited if the company had a change in ownership within the course of a restructuring driven by financial hardships. On 26 January 2011, the European Commission ruled that the "restructuring exception" qualifies as unlawful State aid. As a consequence of the European Commission's decision the German legislature suspended the application of the "restructuring exception" retroactively.

One 28 June 2018, the European Court of Justice (ECJ) ruled, against the European Commission, that the "restructuring exception" does not constitute unlawful State aid.

In order to implement this ECJ ruling, the Act reinstates the "restructuring exception" retroactively to 2008.

Applicability of the tax exemption of restructuring gains

On 27 April 2017, the German Government initiated the implementation of a new Sec. 3a *Income Tax Act* (ITA) and Section 7b *Trade Tax Act* (TTA) as a reaction to a court case in order to address the taxation of restructuring gains and to provide entities threatened by insolvency legal protection from taxation.[3]

The application of these rules was made subject to State aid approval by the European Commission. Apparently, the European Commission concluded that such a procedure is not mandatory for the exemption of such restructuring gains. Hence, this condition for the applicability of the rule is removed by the Act and the exemption will be applicable with retroactive effect as of 9 February 2017 and, upon application, for any open cases in which gains were realized prior to that date.

Variable compensation for minority shareholders in the case of a profit and loss transfer agreement

The German tax consolidation group for CIT and TT purposes requires that the full profit of the tax consolidation group subsidiary is being transferred to the tax consolidation group parent.

The German Federal Fiscal Court decided on 10 May 2017 that a variable compensation payment to minority shareholders is violating this requirement. In order to mitigate the impact of this decision on taxpayers, the Act introduces a new Sec. 14 Para 2 CITA with retroactive effect for all open cases.

A full transfer of the profit, even in case of variable payments to minority shareholders, is deemed to be given if: (i) the compensation to the minority shareholders does not exceed the profit share which could have been distributed to the minority shareholders without the profit and loss transfer agreement; and (ii) if the compensation to the minority shareholders exceeds the minimum compensation this is based on business reasons.

In addition to the previous drafts of the law, the Act addresses cases where variable compensation payments to minority shareholders have been accepted based on the principles stated in the public letter rulings of the Federal Ministry of Finance dated 13 September 1991 and 20 April 2010, e.g., for tracking-stock, and where these variable compensation payments would not be acceptable based on the new Sec. 14 Para. 2 CITA. In such cases, the principles stated in the aforementioned public letter rulings will still be accepted until 31 December 2021. Any structures which rely on these public letter rulings should therefore be reviewed and, potentially, amended before 31 December 2021.

Value Added Tax (VAT) treatment of vouchers

Sec. 3 Para 13-15 *VAT Act* (VATA) and Sec. 10 Para. 1 VATA regarding the VAT treatment of vouchers issued after 31 December 2018 (based on EU directive 2016/1065) remained unchanged.

The new rules include the definition of single-purpose and multiple-purpose vouchers. Multi-purpose vouchers are all vouchers (excluding vouchers that only grant a rebate) that are not single-purpose vouchers. Single-purpose vouchers are all vouchers for which the place of the delivery/service and the applicable VAT is known upon the issuance of the voucher.

The new rules foresee that issuing the voucher is subject to VAT in the case of a single-purpose voucher whereas in case of a multi-purpose voucher the delivery/provision of services but not the issuance of the voucher is subject to VAT.

Secondary VAT liability for operators of e-commerce platforms

The rules creating a secondary VAT liability for operators of e-commerce platforms (Sec. 22f and 25e to the German VATA. According to Act) remained virtually unchanged compared to the latest draft of the law and only added a 10-year period of retention of relevant documents and information. According to these rules, an e-commerce platform operator will only then not be liable for VAT unpaid by a seller if: (i) the operator has obtained the seller's "certificate of registration"; and (ii) there is no reasonable basis for the operator to assume that the seller is not complying with its VAT obligations.

Incentives for electric and hybrid company cars, electric bicycles and public transportation

The private use of a company car is generally subject to income tax (benefit in-kind). The respective benefit for the taxpayer can be valued at a flat monthly rate of 1% of the vehicle's gross list price (plus 0.03% per kilometer for the distance between the home and the place of work) if the company car is used more than 50% for business purposes.

In order to further support their use, the German legislature introduced a special provision for electric and hybrid vehicles as of 2013 according to which the gross list price is decreased based on the capacity of the vehicle's battery by €500 per kWh for purposes of this calculation. The maximum reduction of the gross list price is limited to €10,000 according to the rule. Furthermore, the amount of the reduction per kWh (€500 in 2013) is decreased by €50 for each year starting from 2013, e.g., the reduction for an electric or hybrid company car acquired in 2014 amounts to €450 per kWh and nil as of 2023.

The Act does not change this proposal introduced within the first amendment of the law, according to which the gross list price is reduced by 50% for electric or hybrid company cars acquired in 2019 through 2021 instead.

Furthermore, the usage of public transportation is promoted with a tax-exemption for cases in which companies provide their employees with free public transportation tickets or reimburse their employees for the ticket (so called "Jobtickets"). While a new Sec. 3 No. 15 ITA ensures the tax-exemption from 2019 onwards, the value of the Jobticket will reduce the deductible expenses for commuting between home and work of the employee.

Other changes and legislative procedure

In addition, the Act continues to include a number of smaller changes and "housekeeping" amendments to various items of the *Income Tax Act*, the *Investment Tax Act*, and the *VAT Act*. It is expected that the German Federal Council will approve of the Act on 23 November 2018.

Endnotes

1. See EY Global Tax Alert, *German Federal Ministry of Finance publishes draft Annual Tax Act 2018*, dated 16 July 2018.
2. See EY Global Tax Alert, *German Federal Ministry of Finance amends draft Annual Tax Act 2018*, dated 7 August 2018.
3. See EY Global Tax Alert, *German Parliament adopts legislation on limitation of tax deduction of royalties and tax exemption of restructuring gains*, dated 2 May 2017.

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EYG no. 011951-18Gbl

1508-1600216 NY
ED None

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